

## **PROPOSED NEW RULE 7.5 (Formerly Rule 1-400 Advertising and Solicitation)**

At its October 8, 2004 meeting, the Commission tentatively approved proposed new rule 7.5 (formerly rule 1-400). This proposal has not been considered or approved by the Board of Governors of the State Bar of California. Tentative approval means that the proposed new rule will not be the subject of further amendments until such time as the Chair places the rule on the Commission's agenda for consideration of transmission to the Board of Governors Committee on Regulation, Admissions and Discipline with a request that the Board Committee authorize a public comment distribution of the proposed new rule. (Note: At its October 8, 2004 meeting, the Commission voted to adopt, for purposes of drafting, the numbering and organization system of the ABA Model Rules of Professional Conduct. However, the decision to adopt the Model Rules numbering system should not be taken to mean that the substance of the rules or even the organization within any given rule will be identical to a Model Rule counterpart.)

This document provides the following resources: (1) the text of proposed new rule 7.5; (2) a redline/strikeout version of the proposed rule comparing it to Model Rule 7.5; (3) explanatory notes; (4) concepts considered but not recommended; and (5) excerpts from the Commission's July 9, 2004 meeting summary.

### **Proposed New Rule 7.5 (Formerly Rule 1-400) – Clean Version**

(As approved at the Commission's October 8, 2004 meeting.)

#### **Rule 7.5. Firm Names and Letterheads**

- (a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.
- (b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.
- (c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.
- (d) A lawyer may state or imply that the lawyer has a relationship to any other lawyer or a law firm as a partner or associate, or officer or shareholder pursuant to Business and Professions Code sections 6160-6172 only when such relationship in fact exists.

## **Comment**

[1] A firm may be designated by the names of all or some of its lawyers, by the names of deceased lawyers where there has been a continuing succession in the firm's identity, by a distinctive website address, or by a trade name such as the "ABC Legal Clinic." Use of such names in law practice is acceptable so long as it is not misleading in violation of Rule 7.1. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. It is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a nonlawyer.

[2] With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests that they are practicing law together in a firm. A lawyer may state or imply that the lawyer or lawyer's law firm is "of counsel" to another lawyer or a law firm only if the former has a relationship with the latter (other than as a partner or associate, or officer or shareholder pursuant to Business and professions Code sections 6160-6172) which is close, personal, continuous, and regular.

## **Proposed New Rule 7.5 Comparison to ABA Model Rule 7.5**

(Underlined text is proposed addition; strike-through text is proposed deletion.)

### **Rule 7.5. Firm Names and Letterheads**

- (a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.
- (b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.
- (c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.
- (d) ~~A lawyers~~ may state or imply that ~~they practice in a partnership or other organization only when that is the fact.~~ the lawyer has a relationship to any other lawyer or a law firm as a partner or associate, or officer or shareholder pursuant to Business and Professions Code sections 6160-6172 only when such relationship in fact exists.

### **Comment**

[1] A firm may be designated by the names of all or some of its ~~members~~lawyers, by the names of deceased ~~members~~lawyers where there has been a continuing succession in the ~~firm's identity or by a trade name such as the "ABC Legal Clinic."~~ A lawyer or law firm may also be designatedfirm's identity, by a distinctive website address ~~or comparable professional designation. Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use,~~ or by a trade name such as the "ABC Legal Clinic." Use of such names in law practice is acceptable so long as it is not misleading in violation of Rule 7.1. If a private firm uses a trade name that includes a geographical name such as ~~"Springfield"~~"Springfield" Legal Clinic, " an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. ~~It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a nonlawyer.~~

[2] With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, "Smith<sup>1</sup>"Smith and Jones,<sup>2</sup> for that title suggests that they are practicing law together in a firm. A lawyer may state or imply that the lawyer or lawyer's law firm is "of counsel" to another lawyer or a law firm only if the former has a relationship with the latter (other than as a partner or associate, or officer or shareholder pursuant to Business and professions Code sections 6160-6172) which is close, personal, continuous, and regular.

## Explanatory Notes

### *Introductory Note:*

At present, the marketing of legal services by lawyers is regulated in California through California Rule of Professional Conduct 1-400 and certain sections of the Business & Professions Code. (E.g., Bus. & Prof. Code, sections 6155, 6157 to 6159.2.) At its February 20, 2004 Meeting, however, the Commission voted to explore the possibility of adopting the framework, if not the entire substantive content and language, of the ABA Model Rules of Professional Conduct, Chapter 7, which takes a multi-rule approach to regulating the marketing of legal services. During the discussion leading to that vote, members of the Commission noted that the advertising of legal services and the solicitation of prospective clients is an area of lawyer regulation where national uniformity would be helpful to the courts, the public and practicing lawyers, particularly in light of the current widespread use of the Internet by lawyers and law firms to market their services and the trend in many states toward allowing some form of multijurisdictional practice. Accordingly, after consideration of several drafts of proposed rules that used the Model Rules as templates, the Commission has approved tentative draft rules 7.1 to 7.5. In some instances, however, the Commission made substantive revisions and additions to the language of the Model Rules, which was generally intended to bring the rules in line with current California rules and statutes concerning the marketing of legal services.

Rule 7.1 sets out the general prohibition on a lawyer making false and misleading communications concerning the availability of legal services. Rule 7.2 specifically addresses advertising, a subset of communication. Rule 7.3 is concerned with regulating various means by which a lawyer seeking to market his or her services might make direct contact with a prospective client. Rule 7.4 sets out basic rules governing the communication of a lawyer's fields of practice and claims to specialization. Rule 7.5 does the same for the use of firm names and letterheads. The Commission, however, declined to recommend any rule analogous to Model Rule 7.6, which is intended to regulate political contributions made by lawyers to obtain legal work with government entities or to achieve an appointment as a judge.

### *Title:*

The rule title chosen for this new rule reflects the fact that the format and content of the rule has drawn upon Model Rule 7.5 (entitled "Firm Names and Letterheads") This rule sets out basic rules governing the use of firm names and letterheads.

### *Text:*

1. Paragraph (a) is identical to paragraph (a) of Model Rule 7.5. Paragraph (a) states the general prohibition on a lawyer's use of a firm name, letterhead or other professional designation that is false or misleading under Rule 7.1. Paragraph (a) also permits the use of a trade name in private practice so long as the trade name does not imply a connection with a government agency or with a public or *pro bono* legal services organization. Currently, there is no similar provision in California.
2. Paragraph (b) is identical to paragraph (b) of Model Rule 7.5. Paragraph (a) permits a law firm with offices in more than one jurisdiction to use the same name in each jurisdiction, but requires that identification of lawyers in an office include the jurisdictional limitations on any lawyer in the office not licensed to practice where the office is located. Currently, there is no similar rule or Business and Professions section in California.
3. Paragraph (c) is identical to paragraph (c) of Model Rule 7.5. Paragraph (c) prohibits the use, in a firm name or in communications on behalf of the firm, of the name of a lawyer currently holding public office, unless that person is "actively and regularly" practicing with the firm. The closest counterpart to this provision in the current California Rules of Professional Conduct is Standard (6) to CRPC 1-400, which provides that the following is a presumed violation of rule 1-400: "(6) A 'communication' in the form of a firm name, trade name, fictitious name, or other professional designation which states or implies a relationship between any member in private practice and a government agency or instrumentality or a public or non-profit legal services organization."

4. Paragraph (d) is based upon paragraph (d) of Model Rule 7.5, but has been revised to provide specific reference to the current regulatory framework in California. Paragraph (d) provides that a lawyer may state that the lawyer has a relationship with to any other lawyer or law firm as a partner, associate or shareholder only when such a relationship in fact exists. The language used was taken largely from Standard (6) to current CRPC 1-400.

*Comment:*

1. Comment [1] is based upon comment [1] to Model Rule 7.5. Comment [1] elaborates upon the general prohibition in paragraph (a) of the rule, and gives examples of firm names that violate or do not violate Rule 7.1's proscription against false or misleading communications. The two, next-to-last sentences in Model Rule 7.1, cmt. [1], were deleted as surplusage.
2. The first sentence of comment [2] is identical to the first sentence of comment [2] to Model Rule 7.5 and gives an example of the use of a name that would violate the false or misleading proscription of Rule 7.1. The second sentence of comment [2] has no counterpart in the Model Rule but is instead derived from Standard (8) to current CRPC 1-400. It provides that a lawyer may state or imply that the lawyer is "of counsel" to another lawyer or law firm only if that lawyer has a relationship with the other lawyer or law firm that is "close, personal, continuous, and regular."

*Concepts Considered but Rejected or Postponed for Future Consideration:*

Not applicable.

**Excerpt from the Commission's July 9, 2004 Meeting Summary**

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**A. Consideration of Rule 1-400. Advertising and Solicitation**

The Commission considered a May 29, 2004 e-mail message from Mr. Mohr presenting Draft 2 (5/28/04) of proposed advertising and solicitation rules patterned after MR 7.1 to 7.6. Following discussion, the Commission made various drafting decisions that are summarized below. For the next meeting, the co-drafters were asked to: (1) implement the drafting decisions discussed; (2) develop proposed discussion sections; and (3) provide a recommendation as to the handling of the RPC 1-400(E) advertising standards.

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**A. Consideration of Rule 1-400. Advertising and Solicitation**

The Commission considered a Draft No. 3 of proposed amended advertising and solicitation rules patterned on the comparable Model Rules. The Commission also considered recommendations on the existing advertising standards adopted by the Board of Governors pursuant to RPC 1-400(E). Mr. Mohr presented the background of the current drafts.

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Next discussed was proposed rule 7.5. There was concern that current RPC 1-400(E) standard no. 12 was not included in the rule. In response, it was observed that the co-drafters were merely trying to model this California rule after the ABA rules and did not intentionally remove standard no. 12. Among the points raised during this discussion were the following:

- (1) A concern was raised about the difference in the California standard and the ABA standard. It was claimed that the California standard is lost if the ABA language is used.
- (2) Another member claimed that the California standard is not lost because the ABA language is in addition to the California standard.

- (3) All of these changes are not matters of great substance and we are acting contrary to the goal of uniformity with the ABA in the area of advertising and solicitation rules.

A motion was made to strike proposed rule 7.5(c). The motion failed with a vote of 5 yes, 6 no, 0 abstentions.

Another issue raised in proposed rule 7.5 was the designation "of counsel" as described in 7.5(e). It was observed that many practitioners have differing understandings about the proper use of the term. By consensus, it was agreed that this should be removed from the rule but kept in the discussion or as a standard.

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General information about the Commission, including: its charter; meeting schedule; and a member-staff roster is available at the State Bar of California website. Go to: [www.calbar.ca.gov/ethics](http://www.calbar.ca.gov/ethics) and access the link to the "Commission for the Revision of the Rules of Professional Conduct."